

Nos. 12,070, 12,071.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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No. 12,070.

MYRON E. GLENN, *et al.*,

*Plaintiffs-Appellants,*

*vs.*

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

*Defendant-Appellee.*

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No. 12,071.

RAYMOND F. DRAKE, *et al.*,

*Plaintiffs-Appellants,*

*vs.*

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

*Defendant-Appellee.*

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Petition for Rehearing or, in the Alternative,  
Modification of the Opinion.

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*To the Honorable United States Court of Appeals for  
the Ninth Circuit, and to the Judges Thereof:*

The appellee in the above entitled causes respectfully petitions for a rehearing of these causes or, in the alternative, for a modification of the opinion heretofore rendered, on the ground that the opinion misinterpreted Section 2 (a) (2) of the Portal-to-Portal Act.

Throughout this petition all emphasis is ours unless otherwise noted.

In the opinion it is said:

“There is no question but that the Portal-to-Portal Act constitutes a complete defense to both actions if it applies. Its application depends upon whether the employment by express terms require pay for what has been termed the inactive periods (29 U. S. C. A. § 252 (a) (1)) *or whether like inactive periods in comparable enterprises practice paying therefor.*”

We respectfully submit that the italicized portion of the above quoted portion of the opinion was erroneous and exactly contrary to the express wording of the statute and the express intention of Congress. Section 2 (a) of the Portal-to-Portal Act provided that no employer should be liable on account of any activity engaged in prior to the date of enactment unless it was made so by

“(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

“(2) a custom or practice in effect, at the time of such activity, *at the establishment or other place where such employee was employed*, covering such activity \* \* \*

Congress, in the foregoing language, which is too clear to admit of the slightest ambiguity, excluded *an industry custom or practice* and specifically made that of each particular employer controlling. The Congressional Record shows that this was no inadvertence but the express intention of Congress, which twice debated the question as to whether the controlling custom or practice should be



that of the industry or of each particular place of employment, and twice voted for the wording of the bill as passed.\*

On February 27, 1947, Representative Celler, in speaking against the bill as enacted, said:

“\* \* \* Compensation may be barred by custom or practice. *And it is not custom or practice in the industry but in the particular establishment.* Practices in different plants within the industry may differ. Thus wages may differ in different places. That may be noncompetitive conditions.”

House of Rep., Feb. 27, 1947, 93 Cong. Rec. 1550.

On that same day Representative Kefauver closed his argument in support of Mr. Celler's contentions as follows:

“The gentleman from New York [Mr. Keating] offered an amendment providing that this custom or practice should be that practiced by the *industry in a particular locality.* That would help to a certain degree, *but that amendment unfortunately was not adopted.*”

House of Rep., Feb. 27, 1947, 93 Cong. Rec. 1562.

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\*In Part I of the Portal Act, explaining the reasons for its enactment it is recited:

“\* \* \* (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that *included in their agreed rates of pay*; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated *by either the employer or employee* at the time they were engaged in; \* \* \*

The next day Representative Javits offered the following amendment:

“On page 6, line 5, strike out the period after the word ‘representative’ and substitute a semicolon and insert the following clause: ‘or upon the failure of an employer to pay any other employee for activities heretofore or hereafter engaged in by such employee other than those activities which at the time of such failure were specifically required to be paid for, either by custom or practice *of the particular industry most nearly applicable to such activities*, or by express agreement at the time in effect between such employer and such employee.’ ”

House of Rep., Feb. 28, 1947, 93 Cong. Rec. 1622.

After debate this amendment was defeated on that same day (Congressional Record 1623).

In the Senate in a debate upon the bill, Senator Hawkes on the 18th of March, 1947, said, in part:

“Mr. Hawkes. Is it not true that the bill states that portal-to-portal activities do not come under the term ‘work’ unless the parties specifically understand and agree that they are to come under that term?

Mr. Donnell. Either by contract or custom or practice.

Mr. Hawkes. Yes, either by contract or custom or the habits of the community that are familiar to the people.

Mr. Donnell. No, Mr. President, I would not say ‘the habits of the community’; *but the custom in the*

*particular place of business or particular establishment or other place where the employee is employed.* Mr. Hawkes. That is exactly what I meant. Probably I misspoke myself.”

82 Senate Report, p. 45, colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253.

On the 19th of March, Senator McCarran, in discussing this phase of the bill, said:

“Mr. McCarran. \* \* \* I call particular attention, Mr. President, to the language ‘at the establishment or other place where such employee was employed.’ That does not mean the general custom or practice in an industry, Mr. President. *It does not mean a custom or practice generally accepted and sanctioned by usage.* It means nothing more or less than a custom or practice *put into effect by the employer at the particular establishment in question.*”

Senate of the U. S., March 19, 1947, 93 Cong. Rec. 2321.

The Court’s summarization of Section 2 (a) (2) of the Portal Act apparently construes the Act as though the amendment to it, *twice proposed and twice rejected by Congress* had been adopted. The summarization is not only contrary to the clear language and intent of Congress, but to this Court’s prior interpretation of the Portal Act and to that of other Courts.

In *Tipton v. Bearl Sprott Co.*, 175 F. 2d 432, the District Court dismissed the action on the ground the complaint did not show the employees were engaged in interstate commerce. This Court held the complaint sufficient in that regard but held that it did not show the jurisdiction required by the Portal Act and, since it was conceivably

possible it could be amended, reversed with directions to plaintiffs to amend if they were so advised, saying:

“The third amended complaint did not allege that such activities were compensable by an express provision of a written or non-written contract in effect at the time of such activities, between appellants, their agent or collective-bargaining representative and appellees, or by a custom or practice in effect at the time of such activities, *at the establishment or place where appellants were employed, covering such activities*, not inconsistent with a written or non-written contract, in effect at the time of such activities, between appellants, their agent or collective-bargaining representative and appellees, or that such activities were engaged in during the portion of the day with respect to which they were so made compensable.

“*Thus the third amended complaint failed to state a claim of which the District Court had jurisdiction.* It should have been dismissed on that ground. That the District Court’s jurisdiction was not challenged is immaterial.” .

*Tipton v. Bearl Sprott Co.*, 175 F. 2d 432, 436-7.

The precise question came before the Second Circuit in *Bonner v. Elizabeth Arden, Inc.*, 177 F. 2d 703, 705. In that case the District Court, after the Portal Act, granted a motion to dismiss for lack of jurisdiction. Plaintiff then sought leave to file an amended complaint, in which it alleged that it was the custom and practice in the industry generally to pay for the particular activity for which overtime was sought. The District Court in denying the motion said, in part:

“This, clearly, is not a compliance with Section 2 (a) (2) of the Act, which provides that ‘No employer shall be subject to any liability \* \* \* ex-

cept an activity which was compensable by \* \* \*  
(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, \* \* \*'

*"There may well have been such a custom or practice in the industry, which was not, however, in effect in the defendant's establishment."*

*Bonner v. Elizabeth Arden, Inc.*, 80 F. 2d 243, 245-6.

The Circuit Court of Appeals affirmed the dismissal, saying:

"The proposed amended complaint added to the first count allegations that 'it was the custom and practice in this industry to pay these employees for overtime hours spent in preliminary and postliminary activities prior to and subsequent to the performance of their duties' and that pursuant to the custom in the trade such activities were compensable work.' But there was no allegation, as §2 of the statute required, in respect to activities engaged in prior to May 14, 1947, to the effect that these activities were compensable either by a contract between the employee, or someone acting for him, and the employer in effect at the time they took place, or in accordance with a custom or practice *at the place of employment covering such activities*, in effect at the time they took place, and not inconsistent with a contract binding both employees and employer and in effect at the time. Consequently as regards activities engaged in prior to May 14, 1947, the first count of the proposed amended complaint failed to comply with the jurisdictional requirements of §2 of the Portal to Portal Act, *supra*. \* \* \*"

*Bonner v. Elizabeth Arden, Inc.*, 177 F. 2d 703, 705.

See to the same effect:

*Markert v. Swift & Co.* (2nd. Cir.), 173 F. 2d 517.

The Wage and Hour Administrator on November 18, 1947, in his bulletin interpreting the Act said:

“(d) The words ‘custom or practice’ as used in the Portal Act, do not refer *to industry custom or the habits of the community which are familiar to the people*; these words are qualified by the phrase ‘in effect \* \* \* at the establishment or other place where such employee was employed’. The compensability of an activity under custom or practice, for purposes of this Act, *is tested by the custom or the practice at the ‘particular place of business’, ‘plant’, ‘mine’, ‘factory’, ‘forest’, etc.’*”

The erroneous statement of the Court is readily understandable. Ordinarily, where the rights of the parties depend upon custom or practice, it is the custom or practice *not of an individual, but of the industry*. However, the misinterpretation of Section 2 (a) (2) of the Portal Act apparently was controlling of the decision, for following it the opinion states:

“There is nothing conclusive in the case as it was presented to the trial court upon the issue of practice or custom in other like enterprises.”

There not only was no conclusive showing but no showing at all as to any industry custom or practice. The affidavits as to custom and practice of the P G & E were introduced upon entirely different issues raised by appellee’s affirmative defenses for an entirely different pur-



pose, namely, to show that the custom and practice of that company was similar to the appellee's so as to justify appellee in relying upon certain rulings made by the War Labor Board with reference to the P G & E.

If, as seems apparent from the face of the opinion, the decision of this Court that a trial on the merits is necessary was based on the erroneous assumption that the practice or custom in other like enterprises was an issue upon which a conclusive showing had to be made, then, we submit, we are entitled to a rehearing. If the erroneous statement of the Court was a mere inadvertence in summarizing Section 2 (a) (2) of the Act and this Court feels that the question of lack of jurisdiction of the District Court cannot be decided on a motion but requires a trial on the merits, then we are in the position usually occupied by losing counsel of respectfully disagreeing with the Court's views but bowing to them. However, in such event we believe the Court will agree with us that the opinion should be modified by changing the last paragraph on page 3 to read as follows:

“ . . . Its application depends upon whether the employment by express terms require pay for what has been termed the inactive periods (29 U. S. C. A. §252 (a) (1)) or whether the inactive periods were made compensable by custom or practice in effect *at the time of such activities at the establishment or other place where the appellants were employed.*”

and that there be deleted from the opinion the portions heretofore quoted:

“ . . . There is nothing conclusive in the case as it was presented to the trial court upon the issue of practice or *custom in other like enterprises.*”

While we are confident that it can be demonstrated that the appellee's custom or practice was the custom and practice of the industry not only throughout California but the nation, still, we submit that neither party should be put to the unnecessary time and expense of preparing for or introducing evidence in a trial on the merits upon any issue of an industry custom or practice when Congress twice rejected custom or practice of an industry and made that of each place of employment controlling.

We, therefore, respectfully but confidently submit that we are entitled to a rehearing, or a modification of the opinion in the manner suggested.

All of which is respectfully submitted.

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The undersigned certifies that in his judgment the foregoing petition is well founded and that it is not interposed for delay.

NORMAN S. STERRY.